



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

AEG

Docket No. 3882-99

13 January 2000

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [REDACTED]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary

(2) Subject's Naval Record

1. Pursuant to the provisions of reference (a), Petitioner, a former officer in the Naval Reserve, applied to this Board requesting, in effect, that his naval record be corrected to show that he was not discharged on 31 October 1998 but has continued to serve on active duty without interruption since that date.

2. The Board, consisting of Mr. Taylor and Mes. Nofziger and Humberd, reviewed Petitioner's allegations of error and injustice on 12 January 2000 and, pursuant to its regulations, a majority determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner was appointed to the Naval Academy Preparatory School in 1992 after an outstanding high school football career. A year later, he received an appointment to the Naval Academy, where he continued to play football at the interscholastic level. Upon graduating from the Naval Academy on 23 May 1997, Petitioner was commissioned an ensign (ENS; O-1) in the Naval Reserve.

d. On 23 June 1997 Petitioner reported to Surface Warfare Officers School Command (SWOSCOLCOM), Newport RI to attend the Division Officers' Course (DOC), Class 125. This course is

divided into two phases. Phase One consists of 11 units of instruction in topics such as rules of the road; watchstanding; navigation, maneuvering board and seamanship; correspondence; and damage control. Phase Two consists of six units of instruction in basic engineering. Documentation provided by SWOSCOLCOM indicates that 3.2 is the minimum passing score in DOC.

e. Petitioner's medical records reflect that in July 1997, he began experiencing significant back pain due to weightlifting. A hospital corpsman first class (HM1; E-6) subsequently examined him, prescribed naproxen and flexeril (cyclobenzaprine), and discussed those medications with him. The medical record entry reflecting this treatment is undated, but it calls for a follow-up examination no later than 6 August 1997.

f. In early August 1997, Petitioner failed an examination in navigation (Unit 5A). On 6 August 1997 Petitioner took an examination on the maneuvering board (moboard; Unit 5B). On that same day another student in DOC Class 125, ENS L, submitted a written statement to the effect that he had observed Petitioner and another student, ENS John Ma, discussing and looking at ENS Ma's examination paper. A Lieutenant (LT; O-3) G was then directed to conduct a preliminary inquiry. Additionally, on 7 August 1997 Petitioner was disenrolled from a course in shipboard fire fighting due to a back injury and the prescribed medication. On 11 August 1997 he failed a retake of the Unit 5B examination with a worse score than he achieved on the initial examination. On 26 August 1997 Petitioner's student advisor, LT J, submitted a statement to LT G which reads, in part, as follows:

(Petitioner) is a barely average student with a current average of 3.31 and class standing of 171 of 196. He has failed two exams, navigation and maneuvering board. He has been counseled by me four times. His first counseling was the initial check in. The following sessions were for poor performance on exams and failure to report to me when required . . .

g. On 28 August 1997 Petitioner's instructor, LT M, submitted a statement to LT G to which she attached a comparison data sheet which showed that out of 55 questions on the moboard examination, Petitioner and ENS Ma gave the identical answer 15 times, 13 of which were correct. According to LT M, on 28 other questions, their answers differed by only +/- 1. On that same date, LT G submitted his report and recommended disposition of the case at nonjudicial punishment (NJP). Accordingly, on 29 August 1997 Petitioner was charged as follows with conduct unbecoming an officer, in violation of Article 133 of the Uniform Code of Military Justice (UCMJ):

In that (Petitioner) . . . did, on or about 06 August 1997, while undergoing a written examination on the subject of Unit 5B (series A) (SWOSDOC) Material, wrongfully and dishonorably receive unauthorized aid by discussing the

examination and copying answers from another student, (ENS Ma).

h. On 28 August 1997 Petitioner was counseled for failure to attend a mandatory night study session. On 8 September 1997 he failed another Phase One examination.

i. On 23 September 1997 Captain (CAPT; O-6) McD, the Commanding Officer (CO), SWOSCOLCOM, found that Petitioner had violated UCMJ Article 133 as alleged, and imposed NJP of a punitive letter of reprimand. That letter is dated 25 September 1997 and reads, in part, as follows:

Your lack of judgment and maturity in this matter are major points of concern. However, your failure to live up to your obligations as a naval officer, as outlined and agreed to in your oath of office, is the most disheartening aspect of this incident. Having failed to live up to the standards required of naval officers, you have disappointed a great many people.

j. On 25 September 1997 Petitioner appealed the imposition of NJP. In his appeal, he explained his actions of 6 August 1997 as follows:

On the morning of the 5B Moboard Exam, 06AUG97, I had trouble getting out of bed do (sic) to the severe pain in my back and legs. I proceeded to take my prescriptions that were prescribed to me by Navy Medical. I was told to take 1 tablet of Naproxin and Cyclobenzaprine by mouth three times a day. After getting out of bed, I proceeded to take 3 tablets of both Naproxin and Cyclobenzaprine because of the condition I was in. I took the test that morning in a state that is still not clear to me to this day. My actions on 06AUG97 are truly not characteristic of me, and are truly not something I am proud to talk about. The thing that upsets me most is I knew all of the material the week and night before the exam. I also did exceptionally well on all the quizzes leading up to the exam. I took a practical exam the night before the exam and also did extremely well.

Petitioner then explained as follows his failure on the retake of the Moboard examination:

On 7AUG97 my class section had firefighting school at 0630. Again, I had trouble getting out of bed because of the pain in my back and legs. I took 3 tablets of both Naproxin and Cyclobenzaprine and drove to firefighting school. I was not allowed to participate in firefighting school because of the medication I was on. The Petty Officer at the school told me to go home. When I got home I went to bed. Later that afternoon, LT (G) called me and told me I had to come in to study. I was in no state to drive nor was I in any

state to study. I took my medication as prescribed and reported to LT (G). When I got to SWOSDOC, LT (M) made me take a retake on the 5B exam. I did the first few problems and then proceeded to sit there in a confused state. I wrote down answers without working out any of the problems on the remainder of the exam so I could get back to my apartment and go back to bed.

Petitioner then stated as follows:

In hindsight, I should have told the instructors and my student advisor about my back situation and the pain I was experiencing in my back and legs. I think one of the reasons I did not bother telling anyone in the instructor bay about my back is because I had the impression that they did not care about their people. Furthermore, I was not asked once by my student advisor if I had any problems whatsoever.

k. On 27 October 1997 the acting CO of SWOSCOLCOM endorsed Petitioner's appeal and recommended it be denied. In his endorsement, the acting CO pointed out that Petitioner had admitted to cheating and his "below average" academic performance in DOC, specifically, his class standing after 11 weeks of 164 out of 193, which put him in the bottom 25% of his class. On 13 November 1997 the Commander, Naval Education and Training Center (NETC) denied Petitioner's appeal and set forth the following rationale for his decision:

(Your appeal) states that the reason you cheated on the exam was due to the fact that your judgement was impaired due to prescribed narcotics. I find it unbelievable that you simply did not notify your instructors or student advisor of the condition you claim you were in. I do not accept your statement that ". . . I had the impression that they did not care about their people." You simply could have asked anyone in your chain of command to attend sick call. I find your decision to knowingly cheat on the Navy exam to be exceptionally poor judgment, and in direct contrast to the standards set for United States Naval Officers.

Furthermore, your student advisor, LT (J), presented evidence to the preliminary investigating officer that your overall class performance was below average. You constantly required counseling concerning poor performance and failure to report. (The acting CO) confirms in (his endorsement) that your comments in (your appeal) to me concerning your prior academic achievements are misleading. This . . . strikes directly at the Navy Core Values . . . I must seriously question your honesty, character, and integrity.

l. On 22 December 1997 the acting CO of SWOSCOLCOM forwarded the documentation from Petitioner's NJP to the Chief of

Naval Personnel (CNP), and recommended initiation of administrative separation action and recoupment of the costs associated with Petitioner's education at the Naval Academy. In his letter, the acting CO stated that Petitioner had been removed from training "as a result of his admission of guilt at (NJP)." In this regard, documentation submitted by SWOSCOLCOM indicates that when dropped from training, Petitioner had completed Phase One of DOC and stood 172nd in his class of 177 with a grade point average (GPA) of 3.32. On 8 January 1998 the Commander, NETC favorably endorsed the acting CO's letter.

m. On 9 January 1998 NJP action was initiated against an ENS Rafael Mi for the following violation of UCMJ Article 133:

In that (ENS Mi), (SWOSCOLCOM), did, on or about 1630, 07 January 1998, . . . after learning that he did not earn a passing grade during a post-examination review of (Phase Two) Unit 3, Basic Steam Engineering Course material . . . , wrongfully alter his examination answers after hearing the proper answers given . . . and wrongfully submitted those altered answers for the purpose of receiving additional credit.

ENS Mi's surname indicates that he is Hispanic.

n. On 21 January 1998 LT V, the Legal Officer, SWOSCOLCOM, submitted a memorandum to the CO in which he set forth the facts and circumstances surrounding ENS Mi's case in which he had admitted his guilt. LT V then stated as follows:

. . . ENS (Mi) has had an above average academic record since reporting to SWOS as a student. He had never failed a test at SWOS until the Unit 3 Examination of Basic Steam material, and afterwards, with NJP as a possibility, ENS (Mi) doubled his efforts to succeed. He stayed late at school helping fellow classmates learn material for their final two tests in the Basic Steam curriculum. He graduated with the rest of SWOSDOC Class 126 last Friday. He has written an apology to the engineering staff, which I do not get the impression is merely lip service. I have spoken with him numerous times since the incident and I truly feel that he desires to make amends for what he has done. ENS (Mi) has no previous NJP's or counseling entries in his service record.

. . . Due to the seriousness of the offense and that the integrity and honor of a commissioned naval officer should always be above reproach, I feel this lapse in ENS (Mi's) personal judgment warrants punitive disposition of this case at (NJP). However, I would like to hear more from him at the NJP proceeding before I will be prepared to make a recommendation with regard to potential administrative separation from active naval service . . .

Documentation furnished by SWOSCOLCOM indicates that ENS Mi's final class rank was 115th in a class of 177, with a final GPA of 3.53.

o. On 22 January 1998 CAPT McD's successor in command, CAPT W, found that ENS Mi had violated Article 133 as alleged and imposed NJP of a punitive letter of reprimand. ENS Mi did not appeal this punishment. In his forwarding letter of 15 February 1998 to CNP, CAPT W declined to recommend separation, stating that ENS Mi "appears determined to atone for this grave breach of his personal integrity." On 18 February 1998 the Commander, NETC, concurred with the CO. In April 1998 ENS Mi was reassigned to the USS JUNEAU (LPD 10).

p. On 10 March 1998 CNP advised Petitioner that administrative separation action had been initiated by reason of misconduct and substandard performance of duty, as evidenced by the NJP of 23 September 1997, and that a general discharge was recommended. When advised of his procedural options, Petitioner declined to resign, indicated that he would submit a statement requesting retention, and contested the validity of the debt allegedly owed to the government for his Academy education. His statement of 20 March 1998 reads, in part, as follows:

As I previously stated in my appeal from (NJP), I took the 5B exam in a state that is still not clear to me this day. I was taking two extra pills for every pill I was prescribed to take. Why do I put a lot of the blame of my actions on the narcotic I was on? It is very simple. I have never in my life put my honor on the line for any of my closest friends, let alone for an exam. I have never cheated on an exam in my life, and why would I now after receiving this big burden of duty and loyalty to our country that I am carrying on my shoulders. I myself would not. That is why I feel the narcotics made me react in a way I would have normally never acted. I am an honest person, I have a strict obedience to duty, and I believe in my job and the oath to serve and protect the people of this world. I am ashamed that I imparted poor judgment, but I do believe in redemption and a second chance. One error in judgment, should not determine my worth as a naval officer or a person. I serve and protect the lives of millions of Americans. Where else can you find the honor of doing something so demanding and rewarding? The answer is simple, you can not. For me to throw this all away by cheating on an exam is something that I would not have done, except for the effect of the narcotic I was on.

(The computer print out) states that Flexeril "does not take the place of rest, exercise or physical therapy . . ." It goes on to list the possible side effects of taking too much of the drug, "Convulsions, (seizures); drowsiness (severe); dry, hot, flushed skin; fast or irregular heartbeat; hallucinations; . . . clumsiness or

unsteadiness; confusion; mental depression or other mood or mental changes . . ." I should not be separated from the navy when I have trouble remembering what really went on during the exam. Under normal circumstances, I would be the first to admit that the behavior I showed is unacceptable, and not living up to the strong standards of the Navy Core Values, of Honor Courage and Commitment. However, under the circumstances as they were that day, I feel that I should be allowed a second chance.

. . . I took a prescription drug . . . due to pain in my back. I took more of a pain medication than was prescribed. I did so to relieve an injury. The medication affected me in such a way that I acted not as myself. I am asking for recognition of this fact and to be allowed to stay in the Navy.

Attached to this statement was a computer printout setting forth the side effects of Flexeril.

q. By their endorsements of 15 April and 28 April 1998, CAPT W and the Commander, NETC recommended separation with a general discharge. The CO opined that "special consideration" was not warranted in Petitioner's case and the Commander noted that Petitioner "exercised extremely poor judgment in overuse of a narcotic, and then used it as an excuse to cheat on an exam."

r. On 30 April 1998 CNP recommended that the Secretary of the Navy (SECNAV) direct a general discharge and recoupment of nearly \$75,000 in educational expenses. In the letter of that date, CNP stated as follows:

In (his statement), (Petitioner) responded (to the separation action) by reiterating his actions were due to his self-admitted overmedication. He cites specific warnings about the side effects of the drug, Flexeril, that include seizures, drowsiness, and hallucinations. In his endorsement . . ., the (CO, SWOSCOLCOM) again recommended (Petitioner) be administratively separated from the Naval Service as he had not demonstrated in his statement his case warrants special attention.

. . . (Petitioner's) argument that the "drug made him cheat" ignores his real misconduct, that is, the fact he knowingly and willfully over-medicated himself. He demonstrated a severe lack of judgment by endangering his own health and the safety of those around him. If the over-medication did cause him to cheat, it shows the extent to which drugs, prescribed or not, can alter behavior when abused. (Petitioner's) actions, if done while in the Fleet, could have endangered his ship and its entire crew.

CNP also noted that Petitioner had not submitted anything pertaining to the validity of his debt to the government, despite

his stated intent to do so. In a response to a congressional inquiry, CNP essentially adhered to this position, stating that "not only did (Petitioner) demonstrate poor judgment by cheating on the exam but his judgment was severely impaired as evidenced by overmedicating himself. (His) actions, if done in the Fleet, would have endangered his ship and its entire crew."

s. On 8 and 12 May 1998 Petitioner was examined by a DR (Ph.D) H, a board certified fellow of the American Orthopsychiatric Association. On 13 May 1998 DR H sent a letter to CNP in which he stated that Petitioner was "mentally healthy" but "most distressed over the possibility of his naval career possibly ending." DR H went on to provide a description of the possible side effects of Flexeril and Naprosyn which is relatively consistent with that set forth by Petitioner in his letter of 20 March 1998. DR H then went on to question the procedure by which Petitioner was prescribed these drugs by a non-physician with no detailed warning of the possible side effects of the medications. DR H then provided as follows a possible explanation for Petitioner's actions:

As (Petitioner) relates, the pain was severe and the one tablet each as prescribed was not offering relief. He was scheduled to take the exam on the day indicated and instead of begging off due to the pain, he felt he had to do his duty and carry on, so he took extra medication thinking that would allow him to do so. What we speculate happened here in terms of the extra medication is a function of what we would take the liberty of defining as a "Vince Lombardi Mentality" (of Green Bay Packer and Washington Redskins fame).

The often quoted statement attributed to Lombardi that, "Winning isn't everything, it's the only thing," has been and continues to be the defining stance in competitive sports. That is, that no matter what, you stay in the game and play to win; if severe injuries are sustained, you find a way of fixing it temporarily either by injecting an anesthetic and/or taping it up and get back in the game, and focus on playing, not on your injury. Next to the Navy, his family and country, (Petitioner) loves athletics. We explored his football career and found that he still holds an unbroken New England secondary school record for points scored . . . and yards gained . . . during his high school career. In his senior year he was All New England Running Back and was offered football scholarships to many of the major universities and colleges. He chose the Naval Academy and played football there. Thus, a major and integral part of his life and culture has been serious participation in sports.

The points made here are for the obvious reason, of first acknowledging that it was not good judgment for (Petitioner) to take more medication than prescribed but

secondly and mitigating the first, that it is understandable when one considers where he comes from, in terms of the competitive/athletic mentality. Taping up and playing on continues to this day in all sports when it can be accomplished. The effects of the overdosage of medication on his actions during the examination deserves to be seriously taken into consideration as the merits of his appeal are evaluated . . .

DR H then stated that during the examination, Petitioner "was in what could be described as a chemically altered mental state during which his normal capacity for good judgment was seriously compromised."

t. At some point after CNP forwarded Petitioner's case, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) [ASN/M&RA], acting for SECNAV, asked the Surgeon General of the Navy for an opinion on the effects the prescribed medications had on Petitioner. By memorandum of 22 June 1998, the Surgeon General replied as follows:

(Petitioner) was prescribed Cyclobenzaprine 10 mg; one tablet three times a day, and Naproxen 250 mg; one tablet three times a day. Cyclobenzaprine is a muscle relaxant and Naproxen is a nonsteroidal anti-inflammatory drug. Both drugs are commonly prescribed in the conservative treatment and relief of muscle spasm associated with acute, painful musculoskeletal problems. The usual dosage for Cyclobenzaprine is 10 mg taken three times a day with a range of 20 to 40 mg per day in divided doses. Higher doses can lead to disturbed concentration, agitation, temporary confusion, and transient visual disturbances, upset stomach and other symptomatic complaints.

It is our opinion that the combination of these two medications may have contributed to (Petitioner's) confusion and cheating on the examination.

u. Despite this memorandum, ASN/M&RA decided to approve the recommendation of CNP for discharge and recoupment. In so doing, he justified his action as follows:

In arriving at my decision, I considered the information in (the CNP letter) and the memorandum from the Surgeon General of the Navy . . . When the facts of the case are examined, however, the argument that medication, alone, caused (Petitioner) to cheat does not have merit. The fact that (Petitioner's) test answers were so close to ENS (Ma's) [whose test answers he copied] shows that he was competent, even shrewd, enough to be accurate and meticulous in copying another's test, varying answers slightly but within the narrow tolerances allowed on the test.

Although the action of ASN/M&RA is dated 21 May 1998, this date appears to be erroneous since the advisory opinion is dated 22 June 1998 and the initial order directing Petitioner's separation was not issued until 25 August 1998.

v. On 24 July 1998 ASN/M&RA replied to counsel's letter of 15 May 1998 and stated that in his review of Petitioner's case, he considered the material forwarded with that letter. ASN/M&RA also stated as follows:

After careful consideration of all the facts in this case, I determined that (Petitioner's) decision to cheat on the exam was deliberate and not as a result of his prescription medication. I have, therefore, approved his separation from the Navy and the requirement that he repay the Government for the cost of his Naval Academy education. While (Petitioner) has a strong record of performance at the Naval Academy, I cannot reconcile the seriousness of his offense with his continued service on active duty as a commissioned officer.

w. On 6 August 1998 counsel sent another letter to ASN/M&RA in which he stated, in part, as follows concerning the cases of ENS Mi and Petitioner:

(ENS Mi) graduated in the same Naval Academy class as (Petitioner) and committed the same offense while at the (SWOC DOC). However, (ENS Mi) was not separated for the same offense. The only difference between (ENS Mi) and (Petitioner) is their skin color. Clearly, the disparate treatment given (Petitioner) proves that he was racially discriminated against by the United States Navy. I ask that you personally reconsider (Petitioner's) case in comparison to (ENS Mi's) prior to approving his separation from the Navy.

On 26 August 1998 Petitioner's counsel sent a letter to the Secretary of Defense (SECDEF) requesting termination of the separation orders and an investigation into his client's case. Counsel alleged that such an investigation would reveal "that Naval medical personnel improperly prescribed dangerous medications to (Petitioner), that he was racially discriminated against and that initial requests for information caused the Navy to attempt a cover up of the true facts." Counsel went on to contend that the Navy committed malpractice by permitting a corpsman to prescribe Flexeril and Naproxen to Petitioner. Concerning the discrimination issue, counsel alleged as follows:

. . . (Petitioner) committed a testing violation during an examination at . . . (SWOS) . . . Another young Officer, (ENS Mi), also committed the same offense at SWOS. (ENS Mi) is a young man of color. (Petitioner) is white. Both of these young men went before SWOS' (CO). (ENS Mi) received a letter of reprimand and serves on the USS Juneau

. . . (Petitioner) was told that he was to be discharged. The disparate treatment/punishment given to (Petitioner) is proof of reverse discrimination which has no place in the United States Navy. The offenses were the same but (Petitioner's) punishment was greater because he is white. Likewise, his reduced culpability due to Navy Medicine's malpractice was not addressed.

Counsel then went on to state that he had personally raised these issues with individuals in the Bureau of Naval Personnel and in the office of ASN/M&RA, but "they offered no explanation to the specific issues raised." He also cited CNP's admission, in its congressional response, that Petitioner's judgment was impaired by the prescribed medication.

x. A DR (D.O.) K submitted a letter to Petitioner's counsel on 2 September 1998 in which he opined that based on his experience and information set forth in the *Physicians' Desk Reference*, Flexeril's side effects include disorientation, hallucinations, abnormal thinking, anxiety and depressed mood. He further opined that such medication should only be prescribed by a physician.

y. On 4 September 1998 ASN/M&RA responded to the letters of 6 and 26 August 1998 and stated, in part, as follows concerning his decision in Petitioner's case and counsel's allegations:

I looked closely at the answers from (Petitioner's) first . . . exam as they compared with (ENS Ma's) [the officer from whom he copied]. It was apparent to me that (Petitioner) did not just copy (ENS Ma's) answers directly, but was clever enough to alter them slightly so that his answers were different from (ENS Ma's) but remained within the tolerances allowed on the test. I found it curious that even those questions (ENS Ma) missed were also answered incorrectly by (Petitioner) within the same tolerances as the correct responses. (Petitioner's) effort was accurate, meticulous and, I believe, deliberate.

On the second . . . exam, (Petitioner's) score was far worse than his first, even though it was the very same test . . . It was obvious that he simply did not know the material. It was clear to me, based on my review of the two exams, that (Petitioner) was cognizant of the fact that he was cheating on his first exam and was not so confused that he did not change his answers in a deliberate and calculating fashion. In my judgment, (Petitioner's) self-reported overdose does not release him of responsibility for his act, and the unanimous recommendation of the chain of command that he be separated from the service.

In my review I found no evidence to support your contention that (Petitioner) was the victim of racial discrimination. The decision by his (CO) to award (NJP) and recommend

(Petitioner's) separation from the Navy was based solely on the individual merits of his case. The (CO) who reviewed the case of (ENS Mi) found it to be materially different. I have reviewed that case and concur with the (CO's) assessment.

. . .

With regard to your allegations of medical malpractice, (Petitioner) was prescribed Cyclobenzaprine and Naproxyn by an Independent Duty Hospital Corpsman. These specially trained Corpsmen are authorized by the Navy to prescribe certain types of medication. The individual you expressed concern over was qualified to prescribe Cyclobenzaprine and Naproxyn to (Petitioner).

ASN/M&RA concluded his letter by stating that after carefully reconsidering the case, he could find no reason to reverse his earlier decision given his conclusion that Petitioner "was fully aware of his actions when he cheated on the exam."

z. On 10 September 1998 counsel again requested another review of Petitioner's case, contending that since he was in possession of his client's medical records, ASN/M&RA could not possibly know who had prescribed the drugs at issue. He also enclosed a prescription report which "explains that the side effects include 'unusual thoughts . . . mental depression or other mood or mental changes.'" In response, ASN/M&RA directed that Petitioner's separation be held in abeyance and advised counsel, by letter of 14 September 1998, that he would reconsider the case yet again if counsel provided the medical records at issue or commented on the matters raised in the letter of 4 September 1998. In a letter of 30 September 1998 counsel again provided documentation concerning the after effects of the drugs taken by Petitioner. However, since counsel did not provide the documentation or comments desired, by letter of 22 October 1998 ASN/M&RA adhered to his earlier action. On 26 October 1998 orders directing Petitioner's separation were once again issued.

aa. On 30 October 1998 counsel submitted yet another request for reconsideration to ASN/M&RA, this time attaching a letter from DR K which reads, in part, as follows:

My first comment concerns the report that (Petitioner) was not confused as the result of a reported use of Flexeril, but that he demonstrated "shrewdness and cunning" in providing test answers that were similar to those of another ensign. My initial thought is based on my many experiences in formal education both as an educator and a student. I would expect that students that were being tested on a subject would give answers that are similar in nature. This is not an indication of shrewdness. In making the determination that (Petitioner demonstrated "shrewdness and cunning" (ASN/M&RA) appears to be making a judgment about (Petitioner's) state of mind at the time of

the test. This seems to fall into the realm of a neuropsychological examination. However, determination as to the state of mind of an individual can only (be) made after a battery of neuropsychological tests have been applied and the interpreter has training in psychiatry or neuropsychology. Therefore, it is only if (ASN/M&RA) has training as a psychiatrist or neuropsychologist and has applied such testing that he can authoritatively make a comment as to (Petitioner's state of mind during the test.

DR H engaged in a similar analysis of ASN/M&RA's conclusion that Petitioner was not confused at the time of the morboard exam. He further opined that an individual who overdosed on Flexeril "could have an alteration of behavior patterns but still be able to communicate in writing in a fashion that imparted information of a complex nature."

bb. There is no documentation in the record to show that counsel ever received a reply to the letters of 30 October 1998. Petitioner was discharged on 31 October 1998 after about one year and five months of active commissioned service. A detachment fitness report for the period 6 to 31 October 1998 assigned no marks but noted that it was submitted "upon (Petitioner's) separation from the Navy."

cc. Petitioner submitted his application to the Board in June 1999. In a letter of 10 June 1999 submitted with the application, Petitioner's counsel reiterates his earlier contention that Petitioner's misconduct was mitigated by the side effects resulting from his overdose of Flexeril and Naproxen. Counsel also alleges that given the more favorable outcome in the case of ENS Mi, his client was victimized by reverse discrimination and unjustly disparate treatment.

dd. Subsequently, the documentation concerning Petitioner and ENS Mi was requested from SWOSCOLCOM. In his cover letter forwarding that material, the current CO, CAPT M, opined that Petitioner "made several gross errors in judgment," and was aware of the side effects of Cyclobenzaprine. CAPT M further stated that the more favorable treatment afforded ENS Mi was justified given his strong academic performance and the conclusion of the prior CO, CAPT W, that ENS Mi had learned from his mistake and desired to atone for it.

ee. The Navy Personnel Command (NAVPERSCOM) has submitted an advisory opinion dated 22 November 1999 on the issue of whether Petitioner was victimized by reverse discrimination. The author of the opinion justifies as follows his recommendation that relief be granted:

We have closely reviewed the file, and find no evidence of race being mentioned or considered in the treatment of (Petitioner and ENS (Mi). However, the two officers received very disparate treatment from their command for

the same offense. The record is devoid of any significant difference in the two young men's careers that would explain why they were so differently treated. Both men were . . . recent graduates of the Naval Academy. Both were having academic difficulty at the SWOS School. Both had failed exams, and neither was a strong student in SWOS . . .

. . . (I)t is difficult to discern a rational basis for the disparate handling of the NJP offenses of the two officers. We note that (Petitioner) appealed his (NJP), while ENS (Mi) did not. The disparate handling of the two cases after the (NJPs) raises an inference that (Petitioner) was being punished for appealing his (NJP), which was, of course, his legal right.

In the opinion of the undersigned officer, (Petitioner) was unjustly treated by his command. There is no rational distinction between his offense and ENS (Mi's). Both officers cheated on exams, later admitted the facts, asked for forgiveness and pledged that they would strive to do better. Neither (Petitioner) nor ENS (Mi) was a particularly good student. Each had academic problems that prompted them to cheat . . . Given all of the similarities in their offenses and their service history, it is troubling that ENS (Mi) was allowed to remain in the Navy, whereas (Petitioner) was discharged and sent home . . .

We do not suggest that the Navy's administrative discharge procedures must always be perfectly fair, and that the use of discretion in applying them is not appropriate and necessary. Deciding who is processed for a discharge and who is retained on active duty is a matter of judgment for the command, and many facts will be considered in every case. The command followed the letter of the law in (Petitioner's) case. However, fair and even-handed application of the administrative law has been lost. The command's actions appear to be arbitrary . . .

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, a majority of the Board, consisting of Ms. Nofziger and Mr. Taylor, concludes that Petitioner's request warrants favorable action. The majority believes that given the favorable outcome in the case of ENS Mi, Petitioner's discharge constitutes unjustly disparate treatment.

The majority first rejects Petitioner's contention that his over medication and the resultant side effects warrant relief. The majority believes that voluntary over medication does not excuse misconduct any more than voluntary intoxication. On the morning of 6 August 1997, Petitioner well knew that he should only take one tablet of Flexeril and Naproxen and not the three tablets he

actually ingested. The majority is very much aware of the Surgeon General's memorandum to the effect that Petitioner's over-medication may have clouded his judgment to some extent. However, the majority also notes ASN/M&RA's perceptive analysis of Petitioner's examination and agrees that Petitioner was sufficiently lucid not only to cheat, but to do so shrewdly. The majority also believes that no special training or expertise is necessary to engage in such an analysis.

Additionally, the majority agrees with CNP's comment of 30 April 1998 to the effect that even if Petitioner's faculties were impaired to some degree when he cheated, his bad judgment in over medicating was, in and of itself, sufficient cause for separation. The majority realizes that Petitioner was a football player and the so-called "Lombardi mentality" may have been a factor in Petitioner's decision to over medicate. However, Petitioner was a naval officer and was expected to set a good example by using drugs responsibly. Unfortunately, he failed to do so.

Nevertheless, the majority agrees with and adopts the reasoning of the NAVPERSCOM advisory opinion to the effect that it was unjust to discharge Petitioner but not ENS Mi. The majority is very much aware that no two fact patterns are ever exactly alike. However, the majority believes that the cases of Petitioner and ENS Mi are far more similar than they are different, and the far more unfavorable treatment Petitioner received was fundamentally unfair.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged on 31 October 1998 but has served continuously on active duty since that date. This correction should include, but not necessarily be limited to, removal of the CNP letter of 30 April 1998, the fitness report for the period 6 to 31 October 1998, and the DD Form 214 and General Discharge Certificate of 31 October 1998.

b. That Petitioner be reinstated on active duty in the Naval Reserve.

c. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

d. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file

maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.

MINORITY CONCLUSION:

The minority member of the Board, Ms. Humberd, concludes that no relief is warranted in Petitioner's case. She fully agrees with the majority's analysis of the issue concerning Petitioner's overmedication, but disagrees with the conclusion of the advisory opinion and the majority that Petitioner was victimized by unjustly disparate treatment.

The minority begins her analysis by noting that there is nothing wrong with treating similarly situated people differently so long as there are good and sufficient reasons for such treatment. Further, as the advisory opinion notes, decision makers such as the CO of SWOSCOLCOM are vested with considerable discretion in the administrative separation process. The minority believes that absent persuasive evidence to the contrary, such individuals should benefit from a strong presumption that their actions are proper. Further, two different CO's acted on the cases of Petitioner and ENS Mi, and the minority notes that such individuals may legitimately differ in their opinions concerning the disposition of certain cases.

The minority member then concedes that the cases of Petitioner and ENS Mi are similar. Both were young officers who were struggling at SWOS and cheated on an examination. However, there were also significant differences. Although neither individual had an exemplary academic record, ENS Mi's record was a good deal better than Petitioner's. ENS Mi's GPA was 3.53 while Petitioner's was only 3.32. More significantly, while ENS Mi's class rank of 115 out of 177 was unremarkable, it arguably was in the average range. On the other hand, Petitioner's final class rank, either 164 out of 193 or 172 out of 177, was clearly below average. Further, ENS Mi completed both phases of DOC and failed only one examination--the one he cheated on. Petitioner failed a total of three examinations in phase one alone.

It also appears to the minority that Petitioner had a poor attitude as well as a poor academic record. He had to be counseled on several occasions, once for missing a mandatory study session that he obviously needed. This missed session and one of the examination failures occurred after he was caught cheating, when an individual who genuinely desired retention would have taken care to be especially conscientious. In contrast, ENS MI appears to have shown an excellent attitude, with the exception of the one instance of cheating. Unlike Petitioner, he redoubled his efforts after he was caught, obviously attempting to atone for his mistake.

Additionally, although both Petitioner and ENS Mi cheated on an examination, the minority member notes that they reacted differently when confronted with their misconduct. ENS Mi

forthrightly admitted he was wrong and pledged never to repeat this mistake. Petitioner, on the other hand, attempted to use his over medication not simply as a matter in mitigation, but as a way to evade accountability for his actions.

The minority member does not mean to imply that she necessarily would have processed Petitioner for separation and retained ENS Mi. However, there were perfectly legitimate reasons for different treatment of these two different individuals. Along these lines, the minority specifically rejects the hypothesis of the advisory opinion that Petitioner was processed for separation because he appealed his NJP and ENS Mi did not. First, there is no support whatever in the record for this theory. The minority member is also aware that it is not at all unusual for an individual to appeal an NJP. Finally, Petitioner did not bring up anything in his appeal that would have embarrassed the SWOSCOLCOM or the CO, or otherwise provided a motive for retaliation.

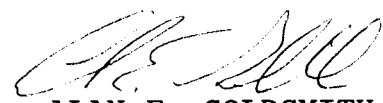
Accordingly, the minority concludes that the record fails to show that either of the SWOSCOLCOM CO's abused his discretion in the case of Petitioner or ENS Mi.

MINORITY RECOMMENDATION:

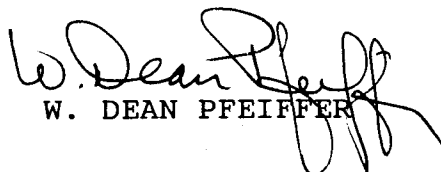
That no relief be granted.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

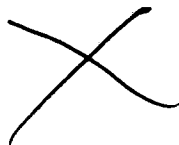
ROBERT D. ZSALMAN
Recorder


ALAN E. GOLDSMITH
Acting Recorder

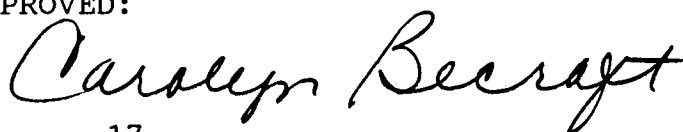
5. The foregoing action of the Board is submitted for your review and action.


W. DEAN PFEIFFER

~~MAJORITY RECOMMENDATION APPROVED:~~



MINORITY RECOMMENDATION APPROVED:



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CAROLYN H. BECRAFT
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)